

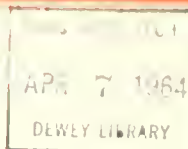
HD28
.M414
no. 53-64

WORKING PAPER
SCHOOL OF INDUSTRIAL MANAGEMENT

COPY 1

THE ROLE OF LAW AND
ECONOMIC DEVELOPMENT
BY

J. D. NYHART
53-64



MASSACHUSETTS
INSTITUTE OF TECHNOLOGY
50 MEMORIAL DRIVE
CAMBRIDGE 39, MASSACHUSETTS



APR 7 1964
DEWEY LIBRARY

COPY 1

THE ROLE OF LAW AND
ECONOMIC DEVELOPMENT
BY

APR 7 1964
DEWEY LIBRARY

J. D. NYHART
53-64

THIS PAPER IS NOT TO BE REPORDUCED IN WHOLE OR IN PART WITHOUT AUTHOR'S
PERMISSION.

1505
1508
1510

—

21

THE ROLE OF LAW IN ECONOMIC DEVELOPMENT

A gathering of American lawyers and economists recently examined the nature of law's involvement in the processes of economic development.¹ This note briefly reviews the four most significant topics discussed:

- 1) the existence of qualities inherent in law which are believed particularly relevant to economic development;
- 2) the characteristic of law as a balancing force within a changing society;
- 3) the role of the lawyer in the economic development of the United States and the extent of the applicability of the U.S. experience to countries currently developing; and
- 4) several suggestions for research and other actions which would advance knowledge of law's relation to economic development.

Sections II, III, IV and V comment in order on these topics; section I provides an introductory framework.

1. The meeting was a three day conference on Law and Economic Development by the Sloan School of Management of the Massachusetts Institute of Technology in December, 1962. (A list of participants is given in Appendix A). The agenda provided that the first evening and following full day of the conference were spent discussing the general topic and the economic and legal settings for three case studies prepared for conference consideration. Background materials were primarily existing works chosen to illuminate the issues discussed. With a few exceptions, specially prepared papers were not a feature of the conference. (A list of background materials may be found at Appendix B.)

On the second morning of the conference, members divided into two groups to consider three case studies: the Nigerian Development Plan of 1962-68, Colombia's efforts to implement the Charter of Punta del Este, and economic cooperation plans within the Inter-African and Malagasy Economic Association.

The Nigerian case consisted of three components: excerpts concerned with trade, industry and the financial institutional framework from the new National Plan (which itself brought together the six year plans of the Federal government and three regions); excerpts from the Federal Minister of Finance's annual budget speech dealing with the Plan and finally a reprint of a talk about the Plan before the Nigerian Economic Society by Dr. Wolfgang Stolper, director of the group primarily responsible for the formulation of the Federal Plan.

I

Economic development is the result of all the forces and energies in a country which collectively raise its per capita output.²

Footnotes continued:

The Latin American case focused on the efforts of Colombia to implement the economic and social goals set forth in the Charter of Punta del Este. The legal profession and system in Latin America have been developing independently for hundreds of years, yet there are indications that neither is geared to make its full contribution to the continent's economic development. The materials for this case were excerpts from the Charter and a specially prepared paper.

The third case consisted of excerpted portions of the declarations made by the member states of the Inter-African and Malagasy Economic Association regarding 1) their proposed association for economic cooperation, 2) the relevant provisions for removing barriers to trade and 3) their intention of creating other multi-national economic institutions. The case studies were thus statements of goals made by planners or politicians. They were blueprints for projected actions, rather than records of past actions. Thus they were neither normal business cases nor law cases.

On the second full day of the Conference, participants divided into two groups. Each was asked to consider the legal implications in one or more of the case studies and from this to attempt a statement, in some form, of the roles law and lawyers play in the economic development process and finally to make recommendations as to research or other activities that might advance the understanding or the usefulness of the relationships.

Thus the conference proceeded in an admittedly unlaywerlike fashion, because of both the generality of the central topic and the character of the cases. What resulted from the methodology adopted was discussion that took on aspects of a potpourri - a hybrid of ideas, insights and recommendations reflecting many different views of jurisprudence, law and society. The multiplicity of experience represented by participants was fully reflected. The sessions were nearly as full ranging and diffuse as the subject matter itself. This stirring and exchange of thought was the chief product of the conference. What follows in sections II-V is not a consensus, because it is doubtful all participants would agree on any substantial portion of what was said, much less the whole. It is a summary of the main themes raised by the conference concerning law and the lawyer in the growth process of the underdeveloped countries. They are recorded here in the hope that they add to the badly needed base of understanding which must come before a legal strategy for development can be built.

2. HAGEN, ON THE THEORY OF SOCIAL CHANGE 10 (1962); LEWIS, THE THEORY OF ECONOMIC GROWTH 9 (1959).

Within this span are included most of the economic activity within a country's borders and much of its political, social and cultural phenomena as well.³ Law, for its part, has been defined in many ways, ranging from U. S. Supreme Court Justice Oliver W. Holmes's "Law is a statement of the circumstances in which the public force will be brought to bear through courts,"⁴ to the view which "considers law to be the means through which social policies become social action."⁵ Under almost any definition of law the interdependence at numerous levels of economic activity and the law may readily be observed.

"That law and economics interpenetrate each other is apparent...if only from the fact that much of the very vocabulary of economics (property, corporations, credit, taxation, patents, etc.) is essentially legal in nature."⁶

3. See generally HAGEN, op. cit., supra., note 1, for discussion of the non-economic factors in economic growth.

4. American Banana Co., v. United Fruit Co., 213 U.S. 347, 356 (1909). At another point, Holmes rephrased the same idea: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the Law." Holmes, The Path of the Law, 10 HARV. L. REV. 461 (1897). Other similar definitions include: "the body of principles, standards, and rules which the courts ... apply in the decision of controversies brought before them." RESTATEMENT, CONFLICTS OF LAWS 83 (1934), and "that which must be obeyed and followed by citizens subject to sanctions or legal consequences," Koenig v. Flynn, 258 N.Y. 292, 179 N.E. 705 (1932), both quoted in CORLEY & BLACK, THE LEGAL ENVIRONMENT OF BUSINESS 4 (1963).

5. ROSTOW, THE SOVEREIGN PREROGATIVE XIII (1962). In the same vein, "Law is not essentially a body of rules at all. Rules are an important part of the tools which law uses Law is a form of social order." BERMAN, THE NATURE AND FUNCTIONS OF LAW 8-9 (1958).

6. Id. at 13.

"More basically, however, law penetrates the very foundations of economics, for it is by means of legal institutions that prices are in fact agreed upon, wages in fact set, business organizations in fact formed and so forth. A theory of perfect competition assumes the existence of a system of contract law. A theory of socialist economics assumes the existence of a system of administrative law..."⁷

The contraction of the time span for development has intensified the role of law. The stated aspirations for economic development in the underdeveloped countries today foretell a far different pattern from those experienced by the U.S. and other already industrialized countries. Developing nations of today are attempting to increase their per capita output more quickly than has yet been done, although they are beginning to realize the difficulties in the way. The increased activity, from government's initial planning through each stage of implementation means more legislation,⁸ more exercise of governmental authority, more change throughout society, more introduction of new foreign institutions, in a shorter period of time than known elsewhere before.⁹

7. Id. at 14.

8. "We are...on safe ground with a general prediction that the needs presently exhibited in new African countries primarily call for legislative rectification, and that decision making by legislation and codification will greatly increase in the years to come." Wegener, *The Role of the Legal Advisor to Newly Independent African States* 60, May 1962 (unpublished thesis in Yale Law School Library).

9. See generally id. passim.

Development plans being implemented in countries throughout the world frequently suggest some idea of the scope and variety of legal work that will be required. The 1962-68 National Development Plan of the Federation of Nigeria provides an example. The plan aims at achieving an annual growth rate of four percent, which is slightly higher than the estimated annual growth for the past ten years; maintaining an investment rate of 15% of Gross National Product; and raising per capita consumption by 1% per year.¹⁰ The cost to the governments and statutory corporations is estimated at £676 million (U.S. \$1,893 million).¹¹ In addition, private sources are expected to invest £350 million (U.S. \$980 million). After three hundred and fifty pages devoted to projects the Federal and three Regional governments intend to undertake, a final chapter of the Plan is addressed to problems and policies of implementation. The fragmentary excerpts from this chapter underlined below illustrate the wide range of legislation implied, some of which are indicated in the accompanying parenthesis. PREPARATION OF PLAN--Information on capital issues and other banking and financial statistics required to be

10. FEDERATION OF NIGERIA, NATIONAL DEVELOPMENT PLAN 1962-68, 23 (1962).

11. Id. at 33. Other targets include:

"To achieve self-sustaining growth not later than by end of the Third or Fourth National Plan. This involves raising the domestic savings ratio from 9.5% of G.N.P. ... to about 15% or higher by 1975 ...

"To develop as rapidly as possible opportunities in education, health and employment.

"To achieve a modernized economy consistent with the democratic, political and social aspirations of the people. This includes the achievement of a more equitable distribution of income both among people and among regions..." Id. at 23.

systematized (enactment, enforcement and better utilization of banking and securities legislation)...information on balance of payments, especially as regards invisible payments and receipts is most uncertain (enactment, enforcement and better utilization of currency and exchange control legislation)...there has never been a survey for best possible utilization of land or water resources...for urban or industrial uses of water (land laws to clarify and define ownership, zoning legislation).

IMPLEMENTATION OF PLAN--INFLATION such a situation would call for...stepping up the tempo of domestic savings, a possible increase in certain lines of taxation and ... adoption of suitable central banking policies. It is also intended to rely as far as possible on indirect controls (enactment and administration of all relevant legislation).

BALANCE OF PAYMENTS--In regard to both exports and imports, prices are determined internationally (international treaties on price stabilization and quotas). Should... a balance of payments crisis arise...it is Government's intention to rely primarily on fiscal and monetary measures (enabling act for Central Bank or other institution)...Should (these) fail... Government will not hesitate to use import licensing and exchange controls (enactment of Exchange Control Acts).

MANPOWER...A significant number of foreign technicians will still be even given the best efforts to develop. Nigerian manpower. (Major efforts are required to ensure effective utilization of these services. (Enactment and/or revision of immigration and labor legislation).¹²

12. Id. at 355-358.

Other sections of this final chapter as well as nearly every section of the plan itself, suggest legislative activity that will be forthcoming in implementing the plan.¹³

Although legislative drafting may, as illustrated above, be the most significant aspect involved, legal activity in implementing development goals does not cease with passage of the law.¹⁴ Administration, interpretation and revision follow, as will the adjudication of disputes over rights and liabilities created by each law.¹⁵ The widening of formal relationships with international institutions and other countries will add to the extensive legal framework that is being built by newly independent nations. Among these are membership in the World Bank and its affiliates; association in multilateral arrangements to achieve economic ends (EEC,

13. In reviewing selected sections of the Nigerian plan dealing with industry, commerce and finance, which formed one part of a conference case study, a working group of the Conference suggested, in addition to those above, a number of projected activities.

14. See Note 7 supra.

15. An informative illustration is provided by Nigerian legislation regarding the taxation of individual incomes. Under that country's federal division of powers, the subject is exclusive to the regions. However, the Federal government has certain constitutional powers respecting the administration of taxes on income and profits. Enactment of a Federal Income Tax Management Act foreshadows Federal-Regional conflict over (1) "the power to determine what is to be included in income and what deductions may be taken"; (2) the power of the regions to "tax the dividends distributed by Nigerian companies (who came under exclusive Federal income tax jurisdiction) and received by individuals who are subject to their personal income tax" and (3) "the problem of inter-governmental tax immunities...inherent in any federal system". W. R. Cotter, Taxation in Nigeria British Tax Review, April-May, 1964.

GATT, international commodity agreements) and the execution of loan agreements with international lending agencies for economic development, such as AID.

Thus the mere quantity of calls upon the legal systems of developing nations in a greatly compressed time span justifies close attention to the relationships of law and economic development in the underdeveloped countries.

The purpose of the M.I.T. Conference was "to arrive at a consideration of law in its broadest sense as an ordering force with legislative, adjudicative and administrative functions, all of which affect the economic growth of a country."¹⁶ The conference was grounded in the conviction that in spite of the apparentness of the vital relationships between law and economic development, they were only superficially understood.¹⁷

16. See note 1 supra.

17. Professor Katz has noted:

"Current scholarship is keenly aware of the importance of the non-economic factors in economic development. Yet curiously little attention has been given to the role of law among such non-economic factors. Understanding must be acquired of the interaction among legal, other institutional, economic and social factors in development and ways must be found to apply such understanding in the work of lawyers, economists and other professional cadres." HARVARD LAW SCHOOL INTERNATIONAL LEGAL STUDIES, REPORT OF THE DIRECTOR, 1954-1961, at 27-28 (1961).

Professor Berman notes that the fact that the relationships were "once well understood is evident from a book such as Adam Smith's Wealth of Nations, which deals with economics and law as integral parts of the same subject. Although modern textbooks in economics often touch only briefly on legal problems, many economists are now coming once again to realize that to neglect the institutional processes through which economic forces operate and by which they are controlled is to adopt an excessively artificial and narrow approach." BERMAN, ep. cit. supra note 4 at 13.

To a lawyer, the relationships should be obvious. They come to his attention daily as aspects of individual assignments to be carried out---a law to be drafted, an opinion to write, a client to advise. Yet because they come piecemeal, he infrequently considers the whole. It is useful for him to reflect on the latter since it increases his awareness of the broader goals of his society. Justice Holmes' statement that

"inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their minds,"¹⁸

is probably as applicable in the underdeveloped countries today as it was in the U. S. at the turn of the century. The lawyer must be sufficiently aware of the economic issues and policies involved so that he can more than adequately meet the expectations of the planner and administrator. Thus a draftsman needs to be able to communicate with the legislator, the legislator with the planner, the judge with the economist, so intertwined are the two disciplines.

The planners, the politicians and the people themselves in underdeveloped countries should also seek a fuller understanding of the role

For discussion of reasons for lack of attention in Africa, see Nyhart, Law, Lawyers and Private Sector Institutions in Africa, in MANAGING ECONOMIC DEVELOPMENT IN AFRICA 173 (Hausman ed. 1963). For a review of the scant consideration provided in the literature, see Weiner, Law and Economic Development 2-4, June 1962 (third year paper, Harvard Law School).

18. HOLMES, Law in Science and Science in Law in COLLECTED LEGAL PAPERS 238 (1920).

of law in economic development. The most important difficulties which the planner and politician must face are normally not legal ones. The barriers to greater cooperation between West African countries in improving communication and trading relationships are political and sociological. The widespread impact of the familial system as a disincentive to greater personal savings and investment is primarily social in nature. The gravitation of young Nigerians away from farms toward urban centers and certain unemployment can appropriately be related first to human nature. The need for financial assistance from the wealthier nations is economic. But those planning and implementing development must be aware of the bottlenecks which will arise in executing a plan if the legal requirements illustrated earlier are ignored or underestimated.¹⁹

At another level one may, by regarding law as one of many instruments for bringing about change,²⁰ grasp the significance of greater understanding by planners and administrators of the role of law. Their task is to bring to bear in an optimum manner all the forces at their disposal which can aid the development process. If there are some kinds

19. The Nigerian plan, supra note 9, does infrequently refer to specific acts such as the Exchange Control Act, but the general reference to the need for a legal framework implementing the plan is scant. Under a three paragraph discussion of institutional problems, the following is found:

"Besides capital and manpower, planned development calls for the setting up of a legal and administrative framework and the establishment of institutions to facilitate the most effective mobilization community savings. Legislation in relation to company law in Nigeria, remains related to a practice of a bygone age and a commission has therefore been appointed to recommend to Government a revised law." FEDERATION OF NIGERIA, op. cit. supra note 9, at 18.

20. See supra note 4.

of law and some general qualities of law which can speed or deter the achievement of development goals, do not planners and administrators, as well as their legal staffs, need to be aware of them?

Finally, educated well trained manpower is currently regarded as the most critical component in the underdeveloped world. The law may prove a source of skilled human resources at a time when such resources are scarce.

II

There are certain basic jurisprudential concepts which, considered in an economic development context, are particularly useful in determining whether the law significantly aids or hinders that development. These are:

1. Predictability.

Justice Holme's view of law as the "prophecies of what the courts will do in fact"²¹ underscores the function substantive law plays by predicting which of men's actions will invoke the power of the state to the benefit of one side or another in a controversy. By these predictions, men come to guide their own actions in relation to others and to have confidence in their assessment of how others will act. In order to facilitate economic activity, sets of rules for guiding economic relationships among people have been established in many fields--the law of contract, sales, agency, companies, labor, etc. In many developing countries, the mass of people are for the first time beginning to enter into economic relationships beyond their immediate traditional social environment. Predictability based on the traditional customs of a closed group will be replaced by systems for predictability that can encompass the widened economic activity.

2. Procedural capability

Substantive rules are given effect through the processes set up to resolve disputes. These procedural institutions include adjudication in a court or administrative tribunal, arbitration, conciliation, and even the

21. Supra note 3.

legislative function itself. They need to operate efficiently if economic activity is to reach its maximum level. Well established procedures tend to hamper arbitrary action. In a developing country such a tendency may serve both good and ill.

3. Codification of Goals.

Legislation often embodies a government's statements of goals for the development of its country. For example, the Employment Act of 1946 declared "it to be the obligation of the national government to use all its powers in order to create and maintain 'conditions under which there will be afforded useful employment opportunities...for those able, willing and seeking to work, and to promote maximum employment, production and purchasing power'".²² A goal may not be so explicitly expressed, yet may be implicit in the legislation. A pioneer investment law, designed artfully to attract overseas investors, is a statement not only of the goal of industrialization, but an indication of a means by which it will be undertaken. A cooperative law may recite goals pertaining to a whole sector of the economy which is to be developed under cooperative institutions. Banking laws set forth the maintenance of certain standards of banking practice as goals to be achieved in the future if not in the present. Thus study of legislation may provide those outside the policy making body a clearer understanding of that body's intentions, especially when the act of legislating has helped the policy making body itself in more clearly defining its goals.

22. ROSTOW, PLANNING FOR FREEDOM 13 (1960).

4. Education.

Closely associated with the goal giving quality is the law's capability to act as a habit forming force that can confirm old habits or create new responses and conditions. New norms of conduct are established.²³ An example is Northern Nigeria's new graduated income tax.²⁴ For the first time, such a tax has been imposed on Northerners by their regional government. Experience so far suggests that being required by law to pay this kind of tax is educative for Nigeria's Northerners; one hopes it will also be habit forming.

5. Balance.

Seldom is a nation dedicated to only one goal. A new country desires rising levels of education, individual freedom through the maintenance of fundamental rights, dignity before the family of nations, as well as economic progress. At different times in the country's life these various goals will come into conflict. Political leadership in a newly independent country, facing the overwhelming challenges inherent in initiating economic development, may feel the cause justifies restriction of criticism and divisive effort and thereby seek to attenuate values, embodied in fundamental rights such as the guarantees of liberty or freedom of speech. Leaders may be willing to risk rending the overall fabric of the society because they believe it inevitable in order to gain maximum achievement

23. "(T)he principal function of law, in Montesquieu's view, is to serve as one of the educational and formative influences of the culture, not merely in bringing the law in action up to the standard of the existing goal of law, but in perfecting the goal of the law." ROSTOW, THE SOVERIEGN PREROGATIVE 141 (1962).

24. Personal Tax Law, 1962 (Northern Nigeria Law No. 6 of 1962).

toward the goals of increased material production and expansion. The legal system by commending adherence to both substantive laws and procedure may be a force for maintaining a balance of society's values. It may help to embody a sense of proportion to the country's effort.

6. Definition and clarity of status.

Law frequently defines the status of people. New land laws in Latin America have changed the status of the campesenos, who for centuries were tied to the land under prevalent forms of land tenure. Recent laws have changed their status from near feudal serfdom to that of contractual workers on their land. Similarly law clarifies the acceptable or legitimate status of things as well as of people. A land law clarifies the use to which land held under different legal categories can be put. Both qualities are needed in time of rapid change for increasing understanding of the direction that change is taking. Law thus provides an ordering process meaningful both to planners and to the masses alike.

7. Accommodation.

Where forces of rapid change have in fact upset old balances and relationships among individuals or groups within a society, there is a need for means to allow them to regain a state of equilibrium. The legal system offers channels through which an individual or a group may, through the qualities of definition and clarification, be accommodated to the new environment. Redress of injustices occurring in the change may be facilitated by law, thus helping society accommodate to change. The machinery of courts, arbitration boards and other administrative bodies provide mechanics for this accommodation.²⁵

25. In reviewing this paper, a participant made the following comment:

III

Conference participants frequently returned to the question of basic rights for the individual such as freedom of speech and safeguards against governmental arbitrariness in a country which is taking rapid steps in development. The discussion focused attention on the quality of law described above as balance and illustrated the room existing for further examination of that and the other qualities in the context of economic development.

Grave dangers to these protections were recognized to exist in a country bent on developing its economy at maximum speed. They may be sacrificed by national leaders who are in a hurry and who may, by asking the people to surrender individual rights, acquire extensive power against which there is little redress. Eventual gain is sacrificed for immediate advantage. To some conferees it seemed the task of the law and lawyers to prevent such an occurrence. Such a view evoked three kinds of questions which were implicit in conference discussion.

First, are the qualities such as those enumerated inherent in the concept of a system of law, independently of its being part of a "socialistic" or "capitalistic" society, a democracy or dictatorship? The

"The relationship of law to development has been generally passive in the past, i.e., development creates social needs and then law is called upon to remedy the situation. However the period between manifestation and correction has always been one in which resources were wasted. I would suggest that in view of the new speed of development and the extreme scarcity of resources, law will have to take on a new function, that of anticipation so that needs will be remedied as they appear and in the most efficient manner. Tied up with this is the question of timing, the necessity of both anticipating, but at the same time not over anticipating.."Nicholas Carter, note.

conference was reminded that oppressive codes are also law, that in Hitler's Germany a rule of law endured until immediately before the regime began to buckle, and that in the Soviet Union law has been a very important aspect of the country's development, with a pronounced reliance upon the constitution as a framework for stating long term goals.

The second question springs from the first. Are there moral or social values, of which the safeguard against governmental arbitrary action is an example, which are inherent in the concept of law and hence in the qualities discussed? Or is the concept of law in essence neutral as to such values until it takes on and reflects the values of the particular society in which it is enmeshed?

A consideration of these issues leads to the question of whether economic development is in fact likely to be advanced by the suppression of such safeguards, e.g., what is the real effect on development of charging any one of law's qualities with a particular value?²⁶

There is little agreement as to how the qualities inherent in law may best be used in forwarding development in specific situations.²⁷ However, there is general agreement that the expression of these qualities as a whole constitutes a concept of a rule of law that is necessarily a

26. For view by American lawyers working in Africa that optimum development requires these safeguards, see MIT Fellows in Africa, Increasing the Value of Government Lawyers in a Developing Country: A Proposal, 1963. (M.I.T. School of Industrial Management Working Paper).

27. Just as a determination to achieve economic development at any cost would be expected to decrease the importance attached to the quality of balance, it would at the same time seem to maximize the characteristics of education, clarification, and procedure setting. Conversely, a political determination

part of rapid economic growth. A rule of law encompasses and exceeds the substantive content of the legislation which has been emphasized so far in this paper. A rule of law implies procedures and machinery which are available to and respected by, citizens of a nation as well as its government. The existence of a rule of law provides the security sought by both nationals and foreigners before they freely commit their energy and funds to the economic life of a country.

to achieve a society balanced in growth and to minimize the destruction of the traditional social fabric would seem to call for the qualities of accommodation, predictability and achievement of equilibrium. So, presumably, would a nation where determination of goals is decentralized or placed on a local community basis and where maintenance of traditional rights for both the group and individual is given high priority.

IV

The Role of Lawyers

The conference focused much of its attention on the role of lawyers as distinguished from the role of law in economic development. Perhaps this was because of the lack of data, perhaps because the conferees found they could discuss these issues more precisely in terms of what lawyers do rather than terms of legal philosophy. In this context discussion distinguished in turn the role of the lawyer acting strictly as a lawyer and that of the lawyer undertaking wider advisory duties, e.g., the craftsman was distinguished from the generalist. In the final analysis the qualities and values law will infuse into the economic development process depend upon actions of humans, primarily those of men trained as lawyers.

In the United States, the lawyer historically has played a central role in the growth of institutions pertinent to the development of the economy. He has been first of all the representative of a multitude of interests as they have come into legal conflict. In this capacity he has advised, argued in court and written on matters of purely legal concern to his client. Lawyers representing clients have found themselves arguing for every kind of political and social value. Representation of a client with a legal problem, almost totally disregarding the values involved, is a part of a lawyer's job. Thus lawyers have argued to uphold the interests of a particular privileged class and they have fought to destroy that privilege. They have argued for and against individual rights, civil liberties, and economic advancement.

The procedure has been that of the adversary process, with the lawyer's eyes not on building a greater economy, but on the advancement of their clients' interests, whether they be private or government. In the adversary process, the lawyer may have advocated the development of an institution essential to the growth of the economy, but his motivation was that the establishment of such an institution best served his client's purpose. In the adversary process, the lawyer may have asked great, searching, moral questions, but again his motivation was to advance his client's interest. In exercising his talents as a skilled craftsman, the lawyer has realized that if he neglected to raise the broader questions, his adversary most certainly would seek his answer on a basis favorable to his client. The net result of the infusion of skilled talent and practical reality has been a thorough debate of the great issues concerning the economic structure of America, with an assured representation of the many points of view.

Thus the role of the lawyer, acting purely as a lawyer, has been characterized by an ad hoc confrontation of the country's major economic issues. From the beginning of the nation's history, questions about the form and structure of its economy have been asked in the context of constitutional interpretation. The U. S. Constitution has been regarded both by those favoring government involvement in the economy, and by those opposing any government involvement, as a source of fundamental law supporting their respective views. Issues concerning the power of the state governments to regulate business, the state's right to do so in the face of federal regulatory power, the position of one state government amidst many sister states, and the scope of the Federal government's

own power to govern have all been raised and fought out in a constitutional context. The forums for debating these economic questions under the country's unique concept of judicial review have been the courts. As cases appeared in the courts to be settled, the lawyers representing the various parties in controversy have been the people who have delineated the issues, and argued the different points of view which have given substance to the economic skeleton. The dominant role accorded the legal profession in filling out the country's economic framework has been closely tied to the evolution within our federal structure of the economic meaning of the Due Process and Commerce clauses of the Constitution. The importance of the lawyers has been amplified by the fact that the judges, who play a decisive role in our legal system, have themselves normally come from the practicing bar.

With the growth of Federal power in the economy, the American lawyer found new roles in the country's economic development. As the Federal government expanded in the 1930's, new administrative and regulatory agencies were created and new laws were passed implementing government's power. The government lawyer drafted the new laws and helped to resolve the conflicts created by the establishment of new institutions. Often, he served as staff in their management. At the same time, the government lawyer's private counterpart was kept busier than before, representing his business clients who were faced with the need of learning anew how to operate within a framework of expanded government regulation.

The reasoned analysis of a situation from all conceivable aspects, the question asking and the answerseeking--all attributes of a lawyer's

craft--began to place him in the role of a general advisor to others. A concept of the lawyer as "general counsel" has arisen in the United States. The lawyer's advice has been sought in non-legal problems with the expectation that he would bring to their resolution the disciplines of his trade. In this capacity of a generalist, he has helped to organize and implement many of the economic and governmental institutions of the country.

Finally, the lawyer has helped to mould the country's political and social values. One of the educated class of men in the growing country, the lawyer assumed a position as community leader. This position in civic affairs, as well as the nature of the legislative process generally, has in the U.S., as in other countries, frequently led the lawyer into politics. There he has also actively shaped societal values.

The Lawyer in Underdeveloped Countries

The Conference raised the relevance of U. S. experience to the underdeveloped countries. Is the lawyer there presently fulfilling a comparable role? Is he likely to play a part in economic development comparable to that which he has in the U.S.? Is there a need for the generalist in these countries not presently filled by other professions or groups? As indicated by the suggestions for research, more information is needed before clear answers begin to emerge.

In Latin American countries, conference participants noted that a history of 300 years of an independent bar that has evolved a pattern different from that in the U.S. Although all generalizations are suspect, the role of the Latin American Lawyer in economic development might be characterized, in the terms previously used, by saying that he has pursued the generalist or

non-legal role, but without the same training in, or development of, the disciplines acquired by his North American colleague. Many law students receive their training on a part-time basis, while holding other jobs. Their examinations are designed to test an ability to memorize principles often learned from "canned" notes, based on lectures delivered by part-time professors who teach because of the prestige associated with the post. Often law graduates never practice, but tend to enter business and government. Often such men will return to the legal practice after several years of experience in other types of work. As a result, the same discipline associated with a first rate American legal education is lacking. Nevertheless, partly because the first university degree holders in economics have only recently emerged, lawyers have been called upon to make economic policy decisions, not always with success.

Further, the essential components of the adversary process described above are lacking in many Latin American countries. The legal profession has frequently backed those with vested interests, with no articulate legal representation of those who proposed change. In some countries there has been a reluctance by courts, when deciding cases in the field of administrative law, to take a position independent from the executive arm of the government.

In summary, the legal profession has not met its potential as a constructive force in the building of economic institutions which is a necessary part of development.

In the new African countries the role that the lawyer will ultimately assume has yet to be determined. Many African countries are only now beginning their own law faculties. Their students will soon be taught locally

rather than being sent to the metropolitan centers for training. This provides an opportunity for establishment of new patterns. Until very recently, lawyers in English speaking countries in tropical Africa have been trained in the United Kingdom. There, the split bar divides the lawyers who argue in court from those who are likely to counsel clients on legal aspects of economic matters. There is neither a written constitutional framework nor a federal structure to give rise to fundamental issues of an economic character which must be resolved in the courts. Also, there has been a tradition that many of England's best educated men serve in the civil service, using their excellent liberal arts training as a background for doing the work of a generalist. For these and many other reasons it would be most unusual to expect that the relatively few African lawyers, mostly trained in the United Kingdom, would have up until now played a predominant part in their countries' economic development. Now, independence has seen the birth of national schools of law in many African countries, coincident with their embarkation upon substantial efforts toward more rapid economic development.

Thus in a very meaningful sense, the legal profession, the structure of legal education, and law itself are at a new demarche in Africa and perhaps, in other countries among the underdeveloped portion of the world. But there is no reason to assume automatically that the U. S. experience can, or should, be transplanted to these nations. Particular circumstances, the nature of legal training and the needs of one country are seldom identical to those of another. There seems reason enough to believe, however, the need for first-rate practitioners of the law craft will increase as written

constitutions are tested or interpreted and development plans implemented. In addition, the greatly increased "bureaucratic" load will probably require good generalists from all sources.

To consider one area, that of creation and implementation of a development plan, the lawyer would identify five phases relative to his work.

1. Plan evolution
2. Legislative implementation
3. Executive decision making and administration
4. Structuring of private arrangements
5. Litigation or dispute settling

Acting as a craftsman of legal skills, the lawyer may find himself involved in all stages. The first stage is the responsibility of the planners and policy makers, yet the lawyer should be present to advise on the legal implications of their decisions. In the second, fourth and fifth stages, the legal role is clear, but recourse to legal opinion may often be mistakenly overlooked in the third area of executive decision making.

Moreover, at the first and third stages, the lawyer may usefully act as a generalist or general counselor. His value would arise from those qualities which have marked the good lawyer in the U.S.: expertise in the art of consistency, special competence in reasoning by analogy; ability to articulate and to see the more distant relevancies; skill in identifying consequences of, and alternative means in, achieving stated objectives; and

finally, skill and negotiation.²⁸ Whether he assumes this role or not will ultimately depend upon the quality of his training and practice and upon the need for generalists in his society. In Africa, the well trained civil servant has served in colonial countries as an able generalist in times past. Whether the new administrators taking the place of the expatriates will adequately fill the vacuum left by their departure is not yet determined. Evidence indicates a crucial shortage of trained men to implement the great changes looming in the near future. It would seem that well trained lawyers may fulfill part of the need.

28. One conference participant, student of economics, noted the following:

"This point concerns the lawyer (American) and his ability as an interpreter of social needs and actions. The new pace of desired development has called forth a "monster" known as economic development. Those who guide and plan this creature are in general professional economists whose training and feel for social problems is all too often completely lacking. The general attitude is that such problems are "someone else's problems", the result being that the economist is often blind to the implications of his plan. This gap is uniquely suited to the lawyer's experience and thus the suggestion that such advice is essential to truly efficient planning. Economists have brought forth some extremely complicated plans, India is a good example, yet in spite of all this even the most efficient plan seems to fail in action, usually for lack of understanding or anticipation of social actions. Here then I suggest is a real and vital role for law and the lawyer in development."

V

Out of the discussion came several suggestions which were felt would further an understanding of the role of law in economic development and advance the unanswered question of whether lawyers could contribute substantially more to those processes in the future.

The building of strong law faculties which will provide truly first rate legal training was considered essential, but the conference did not attempt to state the constituent parts of an adequate legal education.

Further research is needed to illuminate the relationships discussed above. The first seven suggestions below primarily are concerned with finding out more about law's role in economic development, while the last five focus on the lawyer's role.

1. Predictability, procedural capability, codification of goals, education, balance, definition and accommodation were felt to be qualities of law which were especially significant in determining the extent and nature of law's role in economic development. What data can be gathered regarding each of the qualities to test this hypotheses?

2. To what degree is existing legislation actually enforced and implemented? What sort of statutes exist but are not effective due to inability to administer the law?

3. Is there a minimum framework of legislation that can be described as necessary to the most rapid development of a given sector of the economy, e.g., private industry, agriculture, public industry, etc.?

4. To what extent can the decision-making process be automated and decentralized through the legislative process, rather than be left to individual specific decisions, i.e., in income tax, administration manpower decisions and other areas?

5. What are the effects of mobility restrictions on economic development, e.g., how important is a free labor force? What are the impediments to having one?

6. How is change initiated, formulated and executed in similar institutions of different governments? Who and what disciplines are involved with what authority or influence at each stage?

7. What do civil service officials in developing countries think of law and lawyers?

8. Why has the lawyer proved a good generalist in the U.S.? What has been the relative importance of his education and legal institutional environment as determinants of this role?

9. Is there evidence supporting the belief that a similar role for lawyers may exist in any of the underdeveloped countries?

10. What has been the lawyer's historical role in U.S. economic planning, including the experience of its railroad network, the N.R.A., T.V.A., war planning, etc.?

11. How does the law student's conception of his future roles (i.e., corporate lawyer, judiciary, government) affect the education he seeks?

A number of direct steps of an operational nature were suggested. Perhaps most important would be the inclusion of a lawyer on economic

planning or survey missions such as those sent out by the World Bank, whose particular roles would be:

A. Generalist to probe findings of specialists.

B. Specialist in consistency.

C. Observer of institutions and procedures of nations under study to assess problems and propose methods of institutional implementation of change.

D. Draftsman of articulate prose.

E. Overall general counsel in editing of report as craftsman in composition.

Other steps might include assistance in the strengthening of local bar associations, secondment of young U. S. lawyers to private firms and to government agencies where administrative law is being implemented and provision of legal advisory services to the small entrepreneur as an adjunct to technical productivity centers.

Finally, after these and other activities had provided more extensive data and experience it was felt that further dialogues between economists and lawyers, grounded in specific problems, would be useful. These might take place under the auspices of the United Nations, its regional economic commissions or through the law schools and faculties in the U.S. and abroad. Programs involving U. S. lawyers in the underdeveloped lands, such as the Peace Corps African Lawyers Project, M.I.T. and SAILER Programs, have a special responsibility for advancing understanding of these relationships.

J. D. Nyhart
Cambridge, Massachusetts

